Suruhanjaya Syarikat Malaysia v NV Multi Corp Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01–41 OF 2008 AND W-02–523 OF 2006
GOPAL SRI RAM, SURIYADI AND ABDULL HAMID EMBONG JJCA
13 JUNE 2008

Companies and Corporations — Consumer protection — Offer to purchase 'interest' in company — Public offer of rights over burial plots and urn compartments by respondents — Whether purchasers obtained 'interest' or mere rights to use compartments — Whether respondents' business fell within meaning of 'interest' under s 84 of the Companies Act 1965 ('the Act') — Whether respondents had contravened s 91 of the Act — Whether compliance with s 84 crucial — Companies Act 1965 ss 84, 86 & 91

As a group of companies the respondents acquired lands to be developed into memorial parks which provide burial plots, urn compartments and the like and promoted these parks all over Malaysia. The first respondent was an investment holding company which provided management services while the second respondent was the first respondent's agent for the sale of urn compartments and burial plots (compartments and plots) in memorial parks. These compartments and plots were advertised and offered for sale to the public who then entered into an agreement with the second respondent to purchase the said compartments and plots. The respondents also undertook to maintain the structures in the memorial parks and in consideration for these services the purchasers were required to pay a continuity fee, which was paid concurrently with payment of the purchase price for the compartments and plots. This continuity fee was kept in a continuity fund that was set up and managed by trustees appointed by the respondents and none of the profits or interests from this fund were to be distributed to the purchasers. It was the purchasers (appellants) contention that the respondents by not obtaining an approved deed as required under s 86 of the Companies Act 1965 ('the Act') when offering their services to the public had contravened s 91 of the Act. However, the respondents contended that their business did not fall within the meaning of 'interest' as defined under s 84 of the Act and thus did not require any approved deed. The trial judge held that transactions involving payment of money in full for services to be rendered in the future could not fall within the definition of interest under s 84 of the Act and concluded that the respondents' business was not an interest within this meaning because there was no profit available for the purchasers to participate

in. The learned judge also went on to hold that the purchasers were licensees who had merely obtained a right to use the compartments and plots. Hence this appeal wherein the main issue was whether the respondents' business fell within the meaning of 'interest' under s 84 of the Act.

Held, allowing the appeal with costs:

(1) The High Court judge in the instant appeal had given a restrictive or narrow interpretation to the word 'interest' found in s 84 of the Act when he held that that the business under which the respondents operated was not a s 84 interest. A wide meaning should be attached to the key word 'interest', as is supported by a number of Australian decisions which dealt with the definition of 'interest' as found in s 76(1) of the Australian Companies Act, which is in pari materia with the Malaysian s 84(1) of the Act. The scheme under which the respondents operated their business allowed for purchasers to have an interest in the compartments and plots. These items were the assets of the respondents in which the purchasers have an interest, even if merely prospective or contingent, as intended under s 84(1) of the Act (see paras 12–14).

(2) Moreover, it was not necessary for the purchasers to show that the respondents' business attracted any profit in which they may participate. Profit and participation is only one of the ingredients stated in s 84(1) of the Act and are to be disjunctively read. As such, and keeping in mind the need for a wide interpretation, the word 'interest' ought to include 'any interest, whether actual, prospective or contingent in any assets of the business undertaking or scheme of the respondents'. In other words, under s 84(1)(a), the interest does not carry with it the prospect to derive some profit by way of dividend and the interest in the assets is not purely based on financial gains but also includes the benefits, advantages and gains obtained by the purchasers. In this instance, the benefit accruing to the purchasers were their legitimate expectation to be given the compartments and plots and the usage of the common areas and facilities in the memorial parks by them (see paras 16 & 22).

(3) The trial judge erred in his finding that the purchasers were mere licensees and acquired no right or benefit from the use of the compartments and plots. The licence to use those compartments and plots was exclusive to each individual purchaser and not in common with the licences purchased by other purchasers. Further there was a nexus in the relationship between the purchasers and the respondents. This relationship had created a right for the purchasers to participate in

A the common enterprise in which the purchasers were led to expect some interest from the efforts of the respondents as promoters of the scheme (see paras 25–26).

(4) Section 84 and Division 5 of Part IV of the Act are enacted with the B underlying purpose of protection of the public at large of their interest in such a scheme as this one provided by the respondents. A non-compliance with the requirements set out in Division 5 of the Act would lead to a total lack of transparency, crucial for the protection of the public as envisaged under the said Division 5 (see paras 39–40).

C

[Bahasa Malaysia summary

Sebagai sekumpulan syarikat responden-responden telah memperoleh tanah-tanah yang dimajukan menjadi taman-taman peringatan yang D memperuntukkan plot-plot pengebumian, petak-petak untuk bekas simpan abu mayat dan sepertinya dan telah mempromosikan taman-taman sebegini ke seluruh Malaysia. Responden pertama merupakan syarikat pegangan pelaburan yang memperuntukkan perkhidmatan-perkhidmatan pengurusan manakala responden kedua merupakan ejen responden pertama untuk jualan E petak-petak untuk bekas simpan abu mayat dan plot-plot pengebumian ('petak-petak dan plot-plot') di taman-taman peringatan. Petak-petak dan plot-plot telah diiklankan dan ditawarkan untuk jualan kepada awam yang kemudiannya memasuki perjanjian dengan responden kedua untuk membeli petak-petak dan plot-plot tersebut. Responden-responden juga berjanji untuk F menyelenggarakan struktur-struktur di taman-taman peringatan itu dan sebagai balasan perkhidmatan tersebut pembeli-pembeli dikehendaki membayar yuran kesinambungan, yang perlu dibayar serentak dengan bayaran harga belian untuk petak-petak dan plot-plot itu. Yuran kesinambungan ini disimpan dalam tabung kesinambungan yang dibentuk G dan dikendalikan oleh pemegang-pemegang amanah yang dilantik oleh responden-responden dan tiada keuntungan atau faedah daripada tabung ini boleh diagih-agihkan kepada pembeli-pembeli. Adalah pendapat pembeli-pembeli (perayu-perayu) bahawa responden-responden yang tidak mendapatkan surat ikatan yang diluluskan sepertimana yang diperuntukkan H di bawah s 86 Akta Syarikat 1965 ('Akta') semasa menawarkan perkhidmatan mereka kepada awam telah melanggar s 91 Akta tersebut. Walau bagaimanapun, responden-responden menegaskan bahawa perniagaan mereka tidak terangkum dalam maksud 'interest' seperti yang ditafsirkan di bawah s 84 Akta tersebut dan oleh itu tidak memerlukan apa-apa surat ikatan I yang diluluskan. Hakim perbicaraan memutuskan bahawa transaksi-transaksi yang melibatkan bayaran penuh wang untuk perkhidmatan-perkhidmatan yang diperlukan di masa hadapan tidak terangkum di bawah definisi kepentingan di bawah s 84 Akta dan memutuskan bahawa perniagaan responden-responden bukan suatu kepentingan dalam maksud ini kerana

tiada keuntungan untuk pembeli-pembeli untuk melibatkan diri. Hakim yang bijaksana juga selanjutnya memutuskan bahawa pembeli-pembeli merupakan pemegang-pemegang lesen yang hanya mempunyai hak untuk menggunakan petak-petak dan plot-plot itu. Justeru itu rayuan ini dikemukakan di mana isu utama adalah sama ada perniagaan responden-responden terangkum dalam maksud 'interest' di bawah s 84 Akta.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim Mahkamah Tinggi dalam rayuan ini telah memberikan pentafsiran yang ketat atau sempit untuk perkataan 'interest' yang didapati dalam s 84 Akta apabila beliau memutuskan bahawa perniagaan di mana responden-responden beroperasi bukan suatu kepentingan s 84. Maksud yang luas hendaklah diberikan untuk perkataan 'interest' sepertimana yang disokong oleh beberapa keputusan Australia yang membincangkan tafsiran 'interest' sepertimana yang didapati dalam s 76(1) Akta Syarikat Australia, yang in pari materia dengan s 84(1) Akta Malaysia. Skim di mana responden-responden menjalankan perniagaan mereka membenarkan pembeli-pembeli mempunyai kepentingan terhadap petak-petak dan plot-plot itu. Item-item tersebut merupakan aset-aset responden-responden yang pembeli-pembeli mempunyai kepentingan, meskipun hanya secara prospektif atau kebetulan, seperti yang diniatkan di bawah s 84(1) Akta (lihat perenggan 12–14).

(2) Tambahan pula, pembeli-pembeli tidak perlu menunjukkan bahawa perniagaan responden-responden menarik apa-apa keuntungan yang mungkin mereka terlibat. Keuntungan dan penglibatan hanya satu daripada faktor yang dinyatakan dalam s 84(1) Akta dan perlu dibaca secara penyarak. Oleh itu, dan dengan menyedari keperluan pentafsiran yang luas, perkataan 'interest' hendaklah termasuk ' any interest, whether actual, prospective or contingent in any assets of the business undertaking or scheme of the respondents'. Dalam perkataan lain, di bawah s 84(1)(a), kepentingan itu tidak membawa bersamanya prospek untuk mendatangkan keuntungan melalui dividen dan kepentingan dalam aset-aset bukan semata-mata berdasarkan keuntungan kewangan tetapi juga termasuklah faedah, kelebihan dan keuntungan yang diperoleh oleh pembeli-pembeli. Di sini, faedah yang diperoleh oleh pembeli-pembeli adalah jangkaan sah mereka untuk diberikan petak-petak dan plot-plot itu dan penggunaan kawasan-kawasan umum dan kemudahan-kemudahan di taman-taman peringatan oleh mereka (lihat perenggan 16 & 22).

A (3) Hakim perbicaraan terkhilaf dalam penemuan beliau bahawa pembeli-pembeli hanya merupakan pemegang-pemegang dan tidak memperoleh hak atau faedah daripada penggunaan petak-petak dan plot-plot itu. Lesen untuk menggunakan petak-petak dan plot-plot tersebut adalah eksklusif untuk setiap pembeli individu dan bukan sama
B dengan lesen-lesen yang dibeli oleh pembeli-pembeli lain. Bahkan terdapat neksus dalam hubungan antara pembeli-pembeli dan responden-responden. Hubungan ini membentuk hak untuk pembeli-pembeli melibatkan diri dalam usaha sama di mana
C pembeli-pembeli didorong untuk menjangkakan akan mendapat kepentingan daripada usaha-usaha responden-responden sebagai penganjur-penganjur skim itu (lihat perenggan 25–26).

(4) Seksyen 84 dan Divisyen 5 kepada Bahagian IV Akta digubal dengan tujuan utama untuk melindungi orang awam secara keseluruhan
D tentang kepentingan mereka dalam skim sebegini seperti yang diberikan oleh responden-responden. Ketidakpatuhan dengan keperluan-keperluan yang dinyatakan dalam Divisyen 5 membawa kepada ketidaktelusan, penting untuk perlindungan orang awam seperti yang termaktub di bawah Divisyen 5 tersebut (lihat perenggan 39-40).]

E

Notes

For a case on offer to purchase 'interest' in company, purchase of business generally, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 605.

F **Cases referred to**

Applewood Pty Ltd v Dadinbridge Pty Ltd & Ors [1983] ACLC 1130 (distd)

Australian Softwood Forests Pty Ltd & Ors v Attorney General (NSW) (1981) 36 ALR 257 (folld)

G *Corporate Affairs Commission v Australian Softwood Forest Pty Ltd & Ors* [1978] 1 NSWLR 150; 3 ACLR 502 (refd)

R v Commons (1986) 10 ACLR 873 (folld)

Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Ors [1999] 3 MLJ 529 (refd)

Wade v A Home Away Pty Ltd [1981] VR 475 (refd)

H

Legislation referred to

Companies Act 1961 [Aust] ss 76, 76(1)

Companies Act 1965 ss 84, 84(1), 84(1)(a), 84(1)(b), 86, 90, 91, Part IV Division 5

I Trustees Act 1949 s 4

Appeal from: Originating Summons No D5–21–40 of 2004 (High Court, Kuala Lumpur)

Muhammad Redzuan bin Abdullah (Muhamad Faris Othman and Mohamed Sufyan Mohd Mokhtar with him) (Senior Federal Counsel, Companies Commission of Malaysia) for the appellant.
Karen Wilfred (Mazlan & Associates) for the respondents.

Abdull Hamid Embong JCA (delivering judgment of the court):

BACKGROUND

[1] The paramount objective of Part IV Division 5 of the Companies Act 1965 ('the Act') is to provide adequate protection to potential investors or purchasers of 'interest', in a wide range of investments that go beyond shares and debentures of a company, by regulating public offering of 'interest' other than shares and debentures. Section 91 of the Act provides:

> A person shall not issue or offer to the public for subscription or purchase or invite the public to subscribe for or purchase any interest unless, at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.

The respondents did not obtain an approved deed under s 86 of the Act when making the offer to the public in relation to their business. The respondents contended that their business does not fall within the meaning of 'interest' as defined under s 84 of the Act, and thus does not require any approved deed. The main issue before the learned judge and here was whether The respondents' business falls within the meaning of 'interest' under s 84 of the Act.

[2] At the High Court, the respondents asked for and obtained the following declarations:

(i) that the respondents' business in respect of the urn compartments and the burial plots does not fall within the meaning of 'interest' under s 84(1) of the Act;

(ii) that an approved deed under Part IV Division 5 of the Act is not required for The respondents to offer the services to the public; and

(iii) that by offering the services to the public without an approved deed under Part IV Division 5 of the Act, the respondents do not contravene s 91 of the Act.

The learned judge ordered each party to bear their own costs.

A FACTS

[3] The first respondent is an investment holding company a provider of management services. The second respondent is the first respondent's agent for the sale of urn compartments and burial plots in memorial parks. As a group of companies, the respondents develop, promote and maintain memorial parks all over Malaysia. They acquire lands to be developed into memorial parks which provide burial plots, urn compartments, columbaria structure and supporting infrastructure like temples, chapels and rest areas. They advertise and offer these urn compartments and burial plots for sale to the public. Upon purchase of the urn compartment or burial plot, a purchaser will enter into an agreement with the second respondent.

[4] The respondents undertook to maintain the infrastructure, landscaping, columbarium and the tombs in the memorial parks. In consideration for these services, the purchasers are required to pay a continuity fee, which is paid concurrently with payment of purchase price for the urn compartment or burial plot. This continuity fee is kept in a continuity fund, which is set up and managed by trustees appointed by the respondents. The identity and terms of appointment of these trustees are unknown. The trustees are empowered to invest the monies in the said fund in any authorised investments as stipulated under s 4 of the Trustee Act 1949. The respondents claimed that all interests and profits earned from the investments shall be used for the maintenance of the memorial parks and the upkeep of the landscaping, infrastructure and common areas. None of the profits or interests from the continuity fund would be distributed to the purchasers.

[5] The sole issue for determination in the appeal is as worded in the submission by learned counsel of the appellant as the regulator under the Act, which is:

> Whether the respondents' business falls within the meaning of 'interest under s 84(1) of the Act and therefore comply with the requirements under Part IV Division 5 of the Act.

[6] W-02–523 of 2006 is a related appeal by the respondents against the learned judge's order in respect of costs.

WHAT IS A SECTION 84 'INTEREST'?

[7] It is not in dispute that the respondents had offered to the general public to purchase interest in the urn compartments or burial plots which in

our view and for the reasons explained later, form part of the respondents' assets. A purchaser thus becomes a purchaser of rights in the urn compartments or burial plots.

[8] The respondents on the other hand had performed a business undertaking in accepting payments for those urns and plots and payments of the continuity fees. Further, the respondents through the power entrusted upon the trustees of the continuity fund invested monies in that fund and expended the interests and profits made from it.

[9] We are of the view that the respondents' business fall within the meaning of the word 'interest' as defined under s 84(1) of the Act which states:

> 'interest' means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent —
>
> (a) *in any* profits *assets* or realization *of any* financial or *business undertaking or scheme* whether in Malaysia or elsewhere;
>
> (b) *in any common enterprise* whether in Malaysia or elsewhere *in which the holder of the right or interest is led to expect* profits rent or *interest* from the efforts of the promoter of the enterprise or a third party;
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> (c) in any time-sharing scheme; or and
>
> (d) in any investment contract, Whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, *but does not include* —
>
> (e) any share in or debenture of a corporation;
>
> (f) any interest in or arising out of a policy of life insurance;
>
> (g) any interest in a partnership agreement unless the agreement —
>
> (i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is a party to the agreement; or
>
> (ii) is an agreement, or is within a class of agreements, prescribed by regulations for the purposes of this paragraph; or
>
> (h) any participatory interest in a unit trust scheme as defined in section 2 of the Securities Industry Act 1983.
>
> (Emphasis added.)

[10] From that definition it is clear that 'interest' does not encompass all financial or business undertaking or schemes. Thus, for instance, shares in a corporation [para (e)] or an interest in a life insurance policy [para(f)] or in certain partnership [para(g)] or in unit trust schemes [para (h)] are excluded from the definition.

[11] As regards the statutory exemptions found in para (d) *et seq*, in the practically equivalent s 76(1) of the Australian Companies Act, (the interpretation of which as found in Australian authorities form the cornerstone of our judgment in this case), Mason J made the following observation in the leading Australian High Court case of *Australian Softwood Forests Pty Ltd & Ors v Attorney General* (NSW) (1981) 36 ALR 257:

> That a very wide meaning should be given to 'interest' is attested by the exclusion from the statutory definition of shares and debentures (para (d)), interests in life insurance policies (para(e)) and, subject to some qualification, interests in partnership agreements (para(f)). The presence of the power to exempt by regulation other rights of interests from the definition (para(g)) is also of telling significance.

Mason J also held that the definition of 'interest' in s 76(1) of the Australian Companies Act is wider than interest in the ordinary legal sense. His Honour gave the following reasons, with which we agree and adopt as the foundation of our reasoning:

> There are real difficulties in the suggestion that the court can read down the very comprehensive definition of 'interest' by reference to the supposedly unintended consequences of a literal reading on everyday commercial transaction. *The definition is so general and all embracing that it is impossible to say that it necessarily excludes particular transactions which appear to be covered by the general words.* The hazards of adopting such a course are not dispelled by the absence of a supporting context. It would be different if we could gleam from the legislative provisions an overall purpose which, being limited in scope, justified a reading down of the definition. *Unfortunately in this case the search for a legislative purpose takes us back to the very words of the definition for the intended scope of the operative provisions depends so heavily on the comprehensive language of that definition.* As Young CJ observe in *A Home Away Pty Ltd v Commissioner For Corporate Affairs* (1980) 5 ACLR 299 at p 302; [1980] CLC 34,444 at p 34,446, in discussing the meaning of 'interest' as defined in s 76(1) (of the Australian Companies Act 1961):
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> > If it were said that we should give effect to the purpose Parliament wished to achieve, we must first ascertain the purpose and that can only be ascertained from the language used.
>
> (Emphasis added.)

[12] The learned High Court judge in the instant appeal had applied a restrictive or narrow interpretation to the definition of the word 'interest' found in s 84(1) of the Act when he held that the business under which the respondents operated as not being a s 84 interest. His Lordship gave the following reason:

> The fact that the purchasers are paying in full to the plaintiffs (respondents) for services to be rendered in the future, the court is of the view that it is insufficient to bring the plaintiffs' (respondents) business within the definition of 'interest' in s 84. A business can only be said to be an 'interest' if it fulfills all relevant elements of the definition in s 84, but not otherwise. There are a lot of transactions nowadays (especially in insurance, securities, and financial industries) involving payment of money in full for services to be rendered in the future. Obviously all those transactions cannot be said to fall within the definition of 'interest' and subject to the requirements of Part IV Division 5 of the Companies Act 1965, just on that ground alone.

[13] In our view a wide meaning should be attached to the key word 'interest', rather than a restrictive interpretation as adopted by the learned judge. Our view is supported by a number of decisions from Australia discussing how the definition of the word 'interest' found in s 76(1) of the Australian Companies Act (in pari materia with our s 84(1)) should be approached.

[14] The scheme under which the respondents operated their business allows for purchasers to have an interest in the urn compartments and burial plots. These items are the assets of the respondents in which the purchasers have an interest even if merely prospective or contingent, as intended under s 84(1) of the Act.

[15] Which brings us to the next aspect of the definition of the word 'interest' ie the qualifying phrase of 'any right to participate in any profits, assets or realisation of the business undertaking or scheme'. The learned judge had, in concluding that the respondents' business is not an 'interest' taken this view:

> The plaintiffs' business is not an 'interest' within the meaning of limb (a) because there is no profit available for the purchasers to participate. The mere right to use the facilities developed by the plaintiffs is not participation in the assets of the plaintiffs.

[16] We do not think it is necessary for the purchasers to show that the respondents' business attracts any profit to which they may participate. Profit and participating in it is but one limb of the ingredients stated in that definition section. In our view, the ingredients as stated in s 84(1) of the Act

A are to be disjunctively read. As such, and keeping in mind the need for a wide interpretation, it would not be incorrect to read into the word 'interest' there as meaning, 'any interest, whether actual, prospective or contingent in any assets of the business undertaking of scheme of the respondents'.

B **[17]** We also need to answer the question of whether the purchasers have any interest in the assets of the respondents' scheme. We have already determined that the urn compartments and burial plots over which the purchasers have an interest in, are the assets of the respondents' business. Our view is reinforced by the decision of *Australian Softwood Forests*. In that case, C the appellants entered agreements with over 4000 people (called growers) providing for their participation in the planting and harvesting of pine trees on land owned by the appellants. Growers are allocated portions of the plantation and bought trees to be planted and maintained by the appellants. Upon maturity, growers were to fell and remove the trees within six months D or were deemed to have appointed the appellants as their agents to do so. Wilson J in his judgment said as follows:

> Having regard to the number of participants the fact that the sole characteristic which they have in common is that they are members of the public, the nature of E the scheme, and the protective purpose of the legislation, I conclude that the circumstances were such as to establish an offer to the public of an interest for subscription or purchase or an invitation to the public subscribe for or purchase any interest.

F **[18]** At the Court of Appeal (NSW) in the same case [1978] 1 NSWLR 150; 3 ACLR 502, Helsham CJ in Eq had expressed his view on this point in the following words:

> G … it is clear that there are no profits of the undertaking or scheme, nor any realisation of it, which are dealt with by the agreement with the grower. But are there any assets of it? I think there are. *The section cannot be intended to refer to legal ownership, because it may be difficult to say what is owned by an 'undertaking' or by a 'scheme', and one must take a broader view of what is meant by assets of the business undertaking or scheme.* Here the whole enterprise was about pine trees, planting H them, growing them to maturity or to a marketable condition, cutting them down and removing them for sale. The view that I have formed, as will be explained later, is that the trees remained the property of the company until severance, at which time they became the property of the grower on whose allocated portion the stood. But the fact that particular trees were earmarked for particular growers does not negate the conclusion that the trees of each grower, taken separately or with all the I others, were the assets of the scheme — they were the only resource out of which anyone connected with it was going to get anything, and without which there could be no viable plantation scheme at all.
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> (Emphasis added.)

[19] Under s 84(1)(a), the ingredient of an 'interest to any asset of the business undertaking or scheme' does not, in our view, carry with it the prospect to derive some profit by way of dividend. The reference by respondents' counsel to the obiter dictum in the High Court case of *Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Ors* [1999] 3 MLJ 529 which held that the word 'invest would connote expending money or effort of something on the expectation of a return or profit', is not applicable to the definition of 'interest' under s 84(1) of the Act. Learned counsel in his main thrust, had submitted that the purchasers are not investors and as such have no expectation of any pecuniary return. He had submitted that the right to use the urn compartments or burial plots by the purchasers does not constitute a right to participate or an interest in the assets of the respondents as there is no expectation that the purchasers would receive any financial gain from the respondents.

[20] Expectation of a profit however is an ingredient found only under s 84(1)(b) not under para (a). The full court of the Supreme Court of Victoria in *Wade v A Home Away Pty Ltd* [1981] VR 475 was of the same opinion when in that case Young CJ expressed this view:

> ... Moreover, a comparison of para (a) and (b) that schemes carrying the prospect of some profit by way of dividend are referred to. This consideration suggests that no such limitation should be placed on para (a).

[21] In the same case, Jenkinson J also made the finding that the protection of Part IV is not confined to those members of the public who acquired an interest in the scheme merely for financial gain. His Honour said:

> Neither the subject matter of Part IV of the Companies Act 1961 and the Security Industry Act 1975 nor any particular provision of the legislation requires the conclusion that the protection of only those members of the public whose acquisitions are for 'financial gain' or 'economic advantage' to themselves is the legislative objective of Division 5.

[22] Thus, a scheme or business undertaking that requires the approval of the Registrar of Companies pursuant to s 86 of the Act may or may not be for an economic purpose. The ingredient of an 'interest in the assets' under para (a) has to be determined not purely based on financial gains but also the benefits, advantages and gains obtained by the purchasers. In this instance, the benefit or advantage accruing to the purchasers are their legitimate expectation to be given the urn compartments or burial plots and the usage by of the common areas and facilities in the memorial parks.

'COMMON ENTERPRISE' UNDER SECTION 84(1)(b)

[23] Taking away the profit element under s 84(1)(b), we are also of the view that the scheme undertaken by the respondents here also falls under this limb of the definition, which may now be read this way:

> 'Interest' means any interest, whether actual prospective or contingent:
>
> (b) In any common enterprise … in which the holder of an interest is led to expect interest from the efforts of the promoter of the enterprise
>
> 'Interest' here must as we have earlier stated, be given a wide ordinary meaning to mean 'a benefit, advantage or share' and not confined to merely a financial gain, yield, profit or dividend.
>
> Promoter here means the respondents who issued the statement (ie the prospectus) inviting the public to purchase an interest in their scheme pursuant to s 90(1) of the Act (and the Seventh Schedule made thereunder).

[24] We adopt this passage from the judgment of Mason J in *Australian Softwood Forests* as our rationale in finding that there existed a 'common enterprise' here. His Honour said:

> The argument is that in order to constitute a 'common enterprise' there must be a joint participation in all the elements and activities that constitute the enterprise. I do not agree. An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other by B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts or profits. It will be enough that the two operations constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise.
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> And in *R v Commons* (1986) 10 ACLR 873 this was described as a wide ambit concept with a 'continuing involvement intended for both parties.

[25] Learned counsel for the respondents submitted that the purchasers of the urn compartments are mere licencees and acquire no right or benefit from the use of the urn compartments. Further, the licence to use those urn compartments is exclusive to each individual purchaser and not in common with the licences purchased by other purchasers. We cannot agree with this viewpoint.

[26] We take the view that what is necessary is to show the nexus of the relationship between the purchasers and the respondents. This relationship had created a right for the purchasers to participate in the common enterprise in which the purchasers are led to expect some interest from the efforts of the

respondents as promoters of the scheme. We agree with the stand taken by counsel of the appellant who submitted that this relationship clearly existed here in that:

(1) An offer or invitation was made by the respondents and the purchasers were buyers of this offer or invitation. The purchasers then enter into agreements with the second respondent for the purchase of licences for urn compartments or burial plots;

(2) The purchasers spent money to obtain rights to participate in the respondents' scheme. The price for the urn compartments or burial plot is determined by the respondents, together with the amount for continuity fee and service charge, which is subject to change;

(3) The respondents on the other hand obtained capital from the purchasers to operate the scheme, including the continuity fee paid by the purchasers which is put into the continuity fund to be used for maintaining the Memorial Parks;

(4) The purchasers' legitimate expectation to be given the urn compartments or burial plot of their choice when the time comes; and

(5) The respondents also provide common facilities to the purchasers and their family members; and thereby allowing the purchasers to use the assets of the business undertaking or scheme in realising their objectives.

[27] The respondents' argument that there is no common objective in the present case for deriving profits between the purchasers and the respondents also cannot be accepted. As earlier stated, the profit element need not be considered in deciding whether the respondents' enterprise fall under the limb (b) meaning of 'interest'.

[28] *Applewood Pty Ltd v Dadinbridge Pty Ltd & Ors* [1983] ACLC 1130 was cited by the respondents to augment that proposition. In that case, an application for summary judgment for specific performance of a contract for the sale and purchase of a home unit in a building was resisted on the footing, among others, based on the provisions of s 76 of the Companies Act 1961 (Qld), by reason that an invitation to the public to purchase an interest therein was extended by the respondent, which is not a public company. If the subject matter of the contract was an interest as defined by s 76, the consequence would be that the contract was illegal and unenforceable. The question was whether the invitation to purchase the projected units is actually an invitation to purchase an interest in the assets of the financial or business undertaking or scheme.

Connolly J held that

> When a motorcar or a parcel of land surplus to the requirements of a trading corporation is sold the purchaser does not in my judgment acquire an interest in an asset of the trading corporation. On the contrary he acquires something which has ceased to be an asset of the corporation. …
>
> Paragraph (b) can have no application. The only common enterprise in which the unit holders will be involved is the running of the building and there is no suggestion of any expectation of profits, rent or interest from the efforts of the promoter.

[29] From the above passage of the judgment, it is clear that the facts there cannot bring the case within the para (b) definition of interest.

[30] We also decline to accept the respondents' argument that there cannot be a common enterprise in this instant case because there is no commercial venture. As was held in the *Australian Softwood* case, it is not necessary that there be a joint participation in all the elements and activities of the enterprise. It would be sufficient if the two parties are bonded by a 'continuing involvement intended for both parties'. It is and we emphasise, a concept wide in scope.

[31] We have earlier held that in the instant case, taking the broader view, that the urn compartments, the burial plots and the other facilities of the respondents form the assets of their scheme (*Corporate Affairs Commission v Australian Softwood Pty Ltd & Ors*).

[32] As such we cannot find in *Applewood* a basis to support the respondents' contention.

THE AGREEMENT

[33] Earlier in their correspondence with the appellant, the respondents had intimated that an outright sale of the burial plots had been offered to the public and that the purchasers would, as in any ordinary sale and purchase transaction, acquire ownership and exclusive rights to the urn compartments and burial plots.

In subsequent correspondence the respondents represented that the dealings would but merely confer a licence upon the purchasers. The agreements are thus labeled as a purchase of licence in the urn compartments and/or burial plots and that the purchaser would granted a licence for their exclusive use.

[34] Upon perusal of the agreement we find a reference and concession to the existence of the purchasers' interest in the plots. Clause 10 in the agreement pertaining to the burial plots states:

> 10 After the land has been fully developed the Vendor will transfer the same including the plot subject to the sale and purchase herein to its trustee to be held by such trustee upon trust for the Purchaser in common with all purchasers having interest therein.
>
> (Emphasis added.)

[35] Purchasers are also allowed to transfer their rights to a third person of their choice. In cl 9 of the agreement to purchase the urn compartments, this is stated as such:

> The purchaser is at liberty to transfer his rights to the compartment subject to the purchaser furnishing the certificate and pay a fee that may be prescribed …

Clause 13 is a similar stipulation in respect of the burial plots.

[36] We agree with the appellant's stand that such provisions may be misleading to the public. We accept that part of learned counsel of the appellant's submission stating that:

(a) on one hand, the respondents' business undertaking and/or scheme comprised of:

  (i) the development of cemeteries towards a memorial park (including infrastructure and other buildings including places of worship);

  (ii) under the said development, there would be offered to interested members of the public burial plots and the use of urn compartments for a one-off sum (including a continuity fee alleged to be managed by unidentified trustees upon terms not fully disclosed);

(b) on the other hand, the respondents had evidently represented and/or recognised that the members of public as having rights to the following effect:

  (i) a right in apparent perpetuity (including rights of transfer) over burial plots and urn compartments space situated within certain portion of the lands that remain held by the respondents;

(ii) a right over other portions of such lands (including to use roads, common areas and other facilities, example, places of worship covering the other amenities appurtenant to the enjoyment of the plot;

(iii) that those distinct and separate rights were held common with other members of the public premised on its continued maintenance thereof (including an eventual transfer to the respondents; nominated trustees on trust for these members).

THE NEED FOR THIS 'BLUE SKY' LAW

[37] Division 5 of Part IV of the Act is enacted with the underlying purpose of protection of the public at large of their interest in such a scheme as this one provided by the respondents. Section 84 indeed casts a wide net. When the State of Kansas first enacted its maiden securities registration law in 1911, it was announced that 'The state was the hunting ground of promoters of fraudulent enterprises … so barefaced … that it was stated they would sell building lots in the blue sky'. (extract from Your Dictionary.com). This gave birth to legislations now commonly known as 'blue-sky' laws, such as the one found in Division 5 of our Act.

[38] His Honour Murphy J, commenting on such laws in his judgment in *Australian Softwood* made the following remark:

> Legislatures here and overseas have made increasingly stringent 'blue sky' laws to protect prospective investors in such schemes (see *Securities and Exchange Commission v W J Howey Co* [1946] 328 US 293; *Radiata Forestry Development Co Pty Ltd v Evans* (1977) 3 ACLR 82. In response, promoters design increasingly more sophisticated schemes in attempts to circumvent the laws.
>
> Division 5 Part IV of the Companies Act 1961 (NSW) as amended, prohibits a company from making issues or offers to the public for subscription or purchase or from inviting the public to subscribe for or purchase any interest, without first fulfilling certain statutory requirements designed to protect the public. These protective provisions apply whether the scheme is sound, foolish or fraudulent. The legislature has defined 'interest' extremely widely, but to avoid any unintended effect has included specific exemptions and made provision for other exemptions by regulation.

[39] We find in our s 84 and the overall design in Division 5 of the Act a specific provision to protect the general public from such schemes or business enterprise innocuously designed to avoid compliance with the requirements of Division 5 of Part IV of the Act.

[40] Without complying with the requirements set out in Division 5 means no proper monitoring and as such crucial information are withheld from the general public. The identity and terms of appointment of the trustees of the continuity fund are unknown. Their powers to invest the monies in that fund are unknown. Who monitors their performance is unknown. The details on the expenditure and accounts of that fund are unknown. The details of arrangement of the respondents in the event of their winding up are also not known. In short, a total lack of transparency, crucial for the protection of the public as envisaged under the said Division 5. These concerns to which we are sensitive, were expressed by the appellant, as the regulator under the Act.

[41] In giving a wide and liberal construction to the word 'interest' as defined under s 84(1) of the Act, we would adopt without more, this approach and reasoning of Macrossan J in the case of *R v Commons*, who said:

> There is no warrant for reading those words down on the assumption that some limited scope is intended, or upon the basis that the legislature could surely not have intended to catch and proscribe such and such a transaction. The validity of this observation I would like to be established by the remarks of Mason J in *Australian Softwood Forests Pty Ltd v Attorney-General (NSW) (ex rel Corporate Affairs Commission)* (1981) 148 CLR 121 at pp 129–130; 36 ALR 257 at p 262; 6 ACLR at p 50; and of Young CJ in *Wade v A Home Away Pty Ltd* [1981] VR 475 at pp 476–477. At p 477, Young CJ stated:
>
> > The definition is indeed so wide that it is fruitless to attempt to describe in language other than that of the definition itself the schemes or class of schemes that fall within it.
> >
> > The second observation I would make is that it can be *misleading to endeavour to form an accurate impression of the full scope of the intended statutory coverage by looking too single-mindedly at the precise details of the particular schemes* which the limited number of court decisions to date have indicated are caught. While analogy can be illuminating, there is the danger that the decisions which are, after all, mere examples, can induce the observer to believe that they define the limits of the scope of the definition. While certain points of principles may emerge from the decisions upon particular schemes, it is the broad words of the statute which must be returned to and, with respect, it is the delimitation of the correct approach which has been settled in *Wade v A Home Away Pty Ltd* and, authoritatively for us, in *Australian Softwood Forests Pty Ltd* which is of the greatest utility, together with the pronouncements of principle in the latter case.
>
> (Emphasis added.)

[42] For these reasons, we must depart from the findings of the learned judge who founded his reasoning by reading down the definition of the word 'interest' as defined in s 84(1) of the Act. We also have to disagree with the learned judge that the purchasers here are 'licensees and merely obtain a right

to use the urn compartments and burial plots'. We hold that the respondents' business and scheme fall within the contemplation of the definition of interest under s 84.

[43] This appeal is thus allowed with costs here and below. The respondents' appeal on costs is hereby dismissed. The declarations made by the High Court are set aside. In the result we would hold that the respondents are required to obtain an approved deed (s 86 requirement) and issue a statement (s 90 requirement) before offering its services to the public.

Appeal allowed with costs.

Reported by K Nesan